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'DELHI HIGH COURT DISMISSES ANTI-ARBITRATION SUIT FILED BY THE GOVERNMENT OF INDIA'

10 May 2018

The Delhi High Court (Court) pronounced its judgment in *Union of India v. Vodafone Group PLC United Kingdom & Anr.* dismissing Union of India's (Plaintiff) prayer. The Plaintiff had sought a declaration that the Notice of Arbitration filed by Vodafone Group PLC under the India-UK BIPA, and the proceedings initiated thereunder, were an abuse of process of law and consequently null and void.

The Court however granted liberty to the Plaintiff to raise the issue of abuse of process before the tribunal constituted under the India-UK BIPA. It has been clarified that the duly constituted tribunal will decide this issue on its own merit, without being influenced by any observation made by this Court.

The judgement is one of the first to exhaustively deal with Bilateral Investment Treaty (BIT) disputes, primarily, the system of law governing arbitration disputes arising out of such treaties. Further, the Court also had occasion to examine whether, and in what circumstances, the Indian courts could put a restraint on BIT arbitration.

Background to the Vodafone case

Vodafone Group PLC, UK (the Defendant) is the parent company of several subsidiaries. In April 2014, Vodafone International Holdings BV (VIHBV), a subsidiary of the Defendant, initiated arbitration proceedings against the Plaintiff under the India-Netherlands BIPA, challenging the retrospective amendment of the Indian Income Tax Act (IT Act) by the Indian government, to bring VIHBV under the tax-liability net for acquisition of stake in an Indian company. It is relevant to note that the Plaintiff, i.e., the Indian Government raised a jurisdictional objection in these proceedings, contending that the India-Netherlands BIPA excluded issues relating to taxation from its scope.

During the pendency of arbitration proceedings under the India-Netherlands BIPA, the Defendants initiated arbitration against the Plaintiff on 24 January 2017 under the India-UK BIPA, challenging the aforesaid retrospective amendment of the IT Act (stating that the latter of the two BIT proceedings were initiated in light of the aforesaid jurisdictional challenge raised by the Plaintiff). In response, the Plaintiff wrote to the appointing authority i.e. the President of the ICC, stating that the dispute under the India-UK BIPA was identical to the dispute already raised under the India-Netherlands BIPA, and that initiating proceedings under the India-UK BIPA amounted to an abuse of process. Thereafter, the Plaintiff also filed a civil suit before the Court seeking a declaration that the India-UK BIPA proceedings were null and void.

Judgement of the Delhi High Court

The Court dismissed the Plaintiff's plea, while granting liberty to the Plaintiff to approach the tribunal constituted under the India-UK BIPA for its grievances. The pertinent findings of the Court are as follows:

- Jurisdiction of Indian courts in the present dispute: The Court ruled that it had jurisdiction over the Defendants, in *personam* reasoning that the Defendants 'purposefully availed' of Indian jurisdiction, *inter alia*, by making an investment into the territory of India, holding economic interests in India and carrying on business in India. Further, the Court clarified that the Defendants, VIHBV (and its Indian subsidiary) would be one single entity and this Court would have jurisdiction over them. The Court held that there exists no threshold bar to the inherent jurisdiction of national courts over disputes arising out of BIPA arbitrations. The Court further reasoned that if the argument for lack of jurisdiction were to be accepted, then Indian courts would be powerless to execute a BIPA award against the State, even if a foreign national were to approach the Indian courts for its enforcement and execution. In this regard, the Court drew a distinction between Inter-State arbitration, and Investor-State arbitration, holding that while the former arises out of the Treaty (the BIPA), the latter are disputes falling in a *sui generis* category, resembling closest to a contractual obligation, and a contractual right.
- National courts shall only restrain BIT arbitrations under 'compelling circumstances': The Court held that while national courts do retain the power to restrain investor treaty arbitration that is oppressive, vexatious, inequitable or an abuse of legal process, such jurisdiction shall be exercised with great caution and only with "extreme hesitation", under "compelling circumstances", and when the court has been approached in good faith and there is no alternative efficacious remedy available. This was for the reason that a legislation or action that is perfectly lawful under the national law, could nonetheless trigger a successful investment claim under a BIT. The Court further clarified that the filing of multiple claims by entities in the same vertical corporate chain with regard to the same measure is not *per se* vexatious or an abuse of the legal process. Providing sanctity to simultaneous arbitration proceedings, the Court held that proceedings shall not be vexatious when there are substantial reasons to bring two sets of proceedings simultaneously.
- The consolidation of BIT arbitrations is permissible and is preferable to sequential arbitration: The Court reiterated the consistent stand of the Indian judiciary, and held that an injunction shall not be granted on the ground that a second arbitration shall be inconvenient or expensive for the Plaintiff. The Court devised a solution for resolving the potential problem of conflicting awards, similar claims being adjudicated by separate tribunals, and of delay in rendering of awards, by accepting the Defendants' proposal of consolidation of arbitrations. In this regard, the Court held that the Defendants shall be bound by its offer of consolidation if the Plaintiff were to consent to such consolidation of arbitration before the tribunal constituted under the India-UK BIPA.
- India-UK BIPA arbitral tribunal would be best placed to decide to grant a stay on arbitral proceedings: The Court upheld the principle of *kompetenz kompetenz*, holding that the tribunal constituted under the India-UK BIPA would be the best judge to decide its own jurisdiction. The Court further clarified that the possibility of arbitrators electing to grant a stay cannot form an appropriate basis for the national courts to restrain the arbitration and that the Indian Government, after having elected its remedy of agitating the issue of abuse of process before the Tribunal constituted under the BIPA, could not have approached the national courts on the same ground without waiting for an award to be rendered by the said tribunal.

- International law shall apply to the arbitration agreements contained in BIPAs: The Court held that the intent of the BIPAs is to afford protection to investors, and such purpose is better served if the arbitration agreement is subjected to public international law, obligations of States and administrative law, rather than the domestic laws of the State. In this regard, the Court also clarified that while BIPAs constitute of arbitration agreements between a private investor and a State, yet they are not governed by the Indian Arbitration and Conciliation Act, 1996 (including any case-law precedents arising therefrom) not being domestic or international commercial arbitrations.

Comment

This judgement bodes well for investment arbitration in India and is in line with the recent trend of Indian courts of honouring the jurisdiction of international tribunals.

It is also now clear that Indian courts would not lose their inherent jurisdiction over BIT disputes, as long as the investment has taken place in India, and the disputes are in the realm of public international law and administrative law which the Indian courts are bound to enforce and apply. The Court has also paved the way for enforcement of BIT awards in India by holding that Indian courts would have jurisdiction to enforce and execute BIT awards, if approached by a foreign investor. Lastly, while the judgement holds the consolidation of BIPA arbitrations permissible, it remains to be seen whether such consolidation of two arbitration proceedings will be seamless.

- *Sanjeev Kapoor (Partner), Saman Ahsan (Principal Associate) and Shagun Jaggi (Associate)*

For any queries please contact: editors@khaitanco.com

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Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com